Stoody Company, Division of Thermadyne, Inc. *and* International Brotherhood of Electrical Workers, Local Union 369, AFL–CIO. Case 26–CA–15025

November 19, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

Exceptions filed to the judge's decision in this case[1] present the issue of whether the Respondent violated Section 8(a)(3) of the Act by discharging employee Donald Burch and violated Section 8(a)(1) of the Act by suggesting that expressions of dissatisfaction with working conditions were inconsistent with continued employment.

The National Labor Relations Board has considered the decision and record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Stoody Company, Division of Thermadyne, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a) and reletter subsequent paragraphs.

''(a) Rescind from its employee handbook its rule prohibiting employees from counseling other employees to engage in a slowdown or work stoppage.''

2. Substitute the attached notice for that of the administrative law judge.

[1] On June 21, 1993, Administrative Law Judge Michael O. Miller issued the attached decision. The Respondent filed exceptions and a brief and the General Counsel filed a cross-exception and an answering brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] The judge's recommended Order and notice inadvertently failed to include an affirmative provision requiring the Respondent to rescind from its employee handbook its unlawful rule prohibiting employees from counseling others to engage in a slowdown or work stoppage. We have modified the recommended Order and notice to include such a provision.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with discipline and discharge by prohibiting them from counseling one another about work stoppages or by suggesting that expressions of dissatisfaction with working conditions are inconsistent with continued employment.

WE WILL NOT discharge or otherwise discriminate against employees because they support International Brotherhood of Electrical Workers, Local 369, AFL–CIO or any other union or engage in union or other protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind from our employee handbook our rule prohibiting employees from counseling other employees to engage in a slowdown or work stoppage.

WE WILL offer Donald Burch immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL notify Donald Burch that we have removed from our files any reference to his discharge and that the discharge will not be used against him in any way.

STOODY COMPANY, DIVISION OF THERMADYNE, INC.

Jane Vandeventer, Esq., for the General Counsel.
Jerry Kronenberg, Esq. (McBride, Baker & Coles), for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge. This case was tried in Nashville, Tennessee, on January 14 and 15, 1993, based on an unfair labor practice charge filed on April 26, 1992, as amended on January 14, 1993, by International Brotherhood of Electrical Workers, Local Union 369, AFL–CIO (Local 369 or the Union) and a complaint issued by the Regional Director for Region 26 of the National Labor Relations Board (the Board) on May 22, 1992, as amended at hearing. The complaint alleges that Stoody Company, Division of Thermadyne, Inc. (Respondent or the Employer) interfered with, restrained, and coerced employees in the exercise of their statutory rights and discharged an employee because he had engaged in union and other protected concerted activities, in violation of Section 8(a)(1) and (3) of the National Labor Relations Act (the Act). Respondent's timely filed answer denies the commission of any unfair labor practices.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. THE EMPLOYER'S BUSINESS; THE UNION'S LABOR ORGANIZATION STATUS; AND PRELIMINARY CONCLUSIONS OF LAW

Respondent, a corporation with an office and plant in Bowling Green, Kentucky, is engaged in the manufacture and sale of welding products and related materials. In the course and conduct of its business operations during the 12-month period ending April 30, 1992, it sold and shipped goods valued in excess of $50,000 from its Bowling Green, Kentucky facility directly to points located outside the State of Kentucky and purchased and received goods valued in excess of $50,000 directly from points located outside that State. The Respondent admits and I find and conclude that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The complaint alleges, Respondent admits, and I find and conclude that Local 369 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *Background*

The Bowling Green plant began production in July 1991. Prior to that time, the Stoody plant had been located in California. Donald Burch was part of the initial crew of four or five maintenance employees hired in May of that year and sent to California to dismantle and move machinery from the old to the new location. Also in that crew was Larry Woolbright, Burch's foreman until shortly before his discharge.

Respondent has no collective-bargaining agreements and does not recognize Local 369 as the representative of its employees. Burch, a journeyman wireman, is a member of Local 369. Before he was hired, Burch had informed his business agent, Terry Luckett, that he was going for an interview and received clearance from the Union to accept a nonunion position. He received no compensation from the Union for his organizational activities, discussed below.

B. *Union Activity*

Burch did not keep his union affiliation secret. His wardrobe included several T-shirts with the ''Local 369 IBEW'' logo on the back and ''IBEW'' on the front. Burch wore those shirts once or twice a week from the start of his employment. The Union's logo was visible even when worn with bib overalls. Burch also had a plastic coffee mug which bore the IBEW logo; he carried that mug in to the plant on a daily basis and kept it on the top of his multidrawered wheeled tool box as he moved through the plant.

Burch contacted Luckett in January 1992[2] and discussed organizing Respondent's employees. A meeting was set for February 9 and he passed word of that meeting to his coworkers. Luckett sent out several organizational letters to the Stoody employees, none of which identified Burch as being connected with the campaign, and Burch began to distribute union authorization cards. The card which he signed is dated February 12.

C. *Company Knowledge and Response*

The Employer quickly learned of the union campaign. On February 18, Edward Aqua, vice president and general operations manager, issued a ''Policy Statement'' which was to become part of a newly updated employee handbook. In asking that it be read carefully, Aqua stressed that ''It is one of the most important documents you will ever receive at Stoody Company.'' That policy, entitled ''About Unions,'' stated that Stoody was a ''union free Company'' which possessed a ''sincere belief that a union would not benefit the employees.'' It went on to state that it was Stoody's ''intention to prevent any union from interfering with the present open relationship that exists between our employees and management by every proper and legal means available.'' In language common to such statements, it referred to the Union as an unnecessary third party, interfering with the employees' ''privilege to speak and act on your own behalf,'' burdening the employees with union dues and with the potentiality of strikes. The statement concluded: ''Invest in your future security, and that of your family, by protecting your individual freedom and supporting the policy of positive and open management without third party union interference.''

Aqua followed the issuance of the ''Policy Statement'' with a letter, dated February 21. Acknowledging that there

[1] At hearing, the General Counsel's motion to amend the complaint to add two 8(a)(1) allegations was granted over Respondent's objection. Respondent has moved that I reconsider that ruling. Noting that the first amendment presents a purely legal issue, with no facts in dispute, I maintain my ruling with respect to it. The General Counsel has moved to withdraw the second amendment, dealing with the ''no-access'' rule, inasmuch as that issue will be litigated in another complaint. The motion to withdraw that allegation is granted. For the reasons stated infra, I deny Respondent's motion to supplement the record with respect to the status and whereabouts of Roy Young.

[2] All dates are 1992 unless otherwise stated.

was union activity among the Stoody employees, he reiterated much of what had been said in the policy statement, including the assertion that Stoody would ''do everything within our legal means to remain a union free operation.'' Aqua wrote that some employees had been approached to sign authorization cards within the past couple of weeks. He also asserted that an employee had been coerced to sign a card[3] and invited employees to contact management if they felt that ''they [had] encounter[ed] any threatening situation.''

The General Counsel does not contend, and I do not find, that either the policy statement or Aqua's letter contravene Section 8(a)(1) of the Act.

Even before the current campaign began, there was concern about union activity. In what he believed was September or October 1991, Brad Richards, maintenance specialist, was told by Maintenance Department Supervisor Woolbright that ''they [had] found some union literature in the front office.'' Woolbright instructed Richards, ''I need you to lay low . . . they think you may be a union advocate since you have access to the plant.'' Richards denied any involvement with the literature which had been found.

In early 1992, Richards was stopped by Judy Schaum, human resources department administrative assistant. She asked him to step into the office and asked him what was going on with the Union. Richards told her that the employees were talking union because they were unhappy and dissatisfied with things as they were; there was a feeling, he told Schaum, that they were not being treated fairly.

Shortly after the union meeting, Burch had one or two conversations with Dale Hugelmaier, second shift coiling department supervisor. In those conversations, Burch revealed his union background and his support for the Union's campaign; Hugelmaier voiced his personal opposition to unions. In one, which occurred as Hugelmaier was leaving a management meeting about unions, Hugelmaier voiced his belief that unions were not good for employers but benefitted employees who were troubled or did not want to work. Hugelmaier denied that he ever related his conversations with Burch to other members of management until after Burch was discharged. While there is no evidence to directly contradict this claim, it is difficult to believe that he would not have spoken up given management's outspoken opposition to unionism and the concern for who might be involved in union activity, as indicated by both Woolbright's and Schaum's conversations with Richards and Davenport's similar conversation with him, discussed infra.

Burch also revealed his union sympathies to his own supervisor, Larry Woolbright, in two conversations occurring in late February. In the first, Woolbright called him into the office. He asked Burch how things were going and whether Burch thought there was improvement in the plant. Woolbright then asked, ''What [Burch] thought about the Union.'' Burch replied that he thought it was a ''real good idea.'' In a subsequent conversation directed at all of the maintenance employees, Woolbright stated that he had once belonged to a union and was now opposed to them. Burch asked what union he had been a member of and Woolbright stated ''AFL–CIO.''

[3] Evidence of the alleged coercion was not relevant to this hearing and none was proffered.

In late February or early March, Renae Spencer, the personnel manager, approached Burch while he was working. She asked him how things were going, whether he was having problems with Woolbright and what he thought was wrong with people on the floor. He told her of employee concerns about the loss of sick days, pay cuts in fabrication, and their lack of input in the setting of rules and regulations, which they felt were being dictated to them. Spencer responded, ''If we were going to be so nitpicking, maybe this wasn't the place for us.''[4]

After Burch was discharged (discussed infra), Dennis Davenport, who had succeeded Woolbright as maintenance supervisor, spoke with Richards. Davenport told Richards that ''the people up front are really scared.'' Richards asked why and Davenport said, ''They think you are a union advocate . . . they think somebody got a mailing list out from up in the front office.'' As he had done earlier in speaking with Woolbright, Richards disavowed any involvement and said that he did not know why he would be suspected. Davenport said that he had told management that he thought their suspicions were misplaced. However, he instructed Richards to ''lay low, keep a low profile,'' remaining ''out of sight, out of mind.''

None of the conversations described above were contradicted by any of Respondent's witnesses.[5]

Spencer denied having learned that Burch was ''actively involved'' or ''involved at all'' on behalf of Local 369 ''in its campaign'' among the Stoody employees until she was notified of the unfair labor practice charge. She further denied that she and Hugelmaier had discussed the latter's union-related conversations with Burch. Neither denial rises to the level of a claim that she was unaware of Burch's affiliation with that union or of his affinity for the Union and his support of its campaign. Given that Burch openly displayed his affiliation with Local 369, wearing a T-shirt and carrying a cup, both bearing its logo, openly acknowledged his support for the campaign in discussions with several supervisors, and frankly told Spencer what was bothering the employees *when she confronted him*, I am compelled to find that management, on all levels, was aware of Burch's union membership, affiliation and sympathies. In view of that knowledge, Spencer's denial of actual knowledge ''that he was actively involved . . . or involved at all'' in the IBEW's campaign, even if true, is largely irrelevant. I am compelled to conclude that Respondent's management, including Spencer, at least suspected his involvement, as it suspected that Richards was involved.

D. *Stoody Rules*

Stoody's employee handbook was distributed in March 1992. It contained the policy statement on unions, as described above. It also included, under ''Involuntary Termination,'' the following:

[4] Of all the foregoing, this remark is the only one contended to be in violation of Sec. 8(a)(1).

[5] Woolbright, no longer employed by Stoody, did not testify. Hugelmaier testified along the lines described above. Spencer, Schaum, and Davenport each testified without confirming or denying the remarks and questions attributed to them. The uncontradicted testimony of Burch and Richards was credibly offered.

> Because of the seriousness of dismissal for unsatisfactory job performance or attendance, the company follows a standard progressive procedure in dealing with such problems. This procedure includes counseling, letters of warning, and suspension. . . . While the company wants to provide every opportunity to correct performance or attendance problems, it cannot continue indefinitely to employ a person whose performance or attendance is less than satisfactory.
>
> Whenever appropriate, employees will be given an opportunity to improve their deficiencies before termination. However, because of the seriousness of some actions, immediate dismissal may be justified. These actions include, but are not limited to, the following:
>
> A. Safety and Security
>
> 1. Creating unsafe conditions, commiting an unsafe act or violating a safety practice or rule.
>
> B. Attendance
>
> 2. Being absent or tardy excessively.
>
> C. Job Performance
>
> 1. Deliberately restricting output or counseling other employees to engage in a slowdown or work stoppage.[6]
>
> E. Personal Conduct
>
> 1. Insubordination, refusal to . . . follow instructions issued by management.

E. *Burch's Discharge*

1. The discharge interview

On April 10, after the others in his department were sent home, Davenport told Burch to put his tools away and sent him to the front office.[7] There, he was confronted by Renae Spencer, director of human resources, and Chet Young, director of manufacturing, who told him that his services were no longer necessary. He protested, ''This is crazy!'' Young told him that he ''was not Stoody material'' and ''had a bad attitude'' and began to refer to some work on a crane motor. He also referred to the fact that Burch had taken a cup of coffee into the plant that morning. Burch repeated that the Employer's actions were ''bogus'' and ''crazy.'' He was given a personnel activity notice which stated, as the reasons for the discharge, ''Unsatisfactory work performance, attendance, and attitude.''

At the time of his discharge, Burch's personnel file contained no warnings, either verbal or written. He had not been suspended for any violations of the Employer's code of conduct. Other employees had received warnings, although only two had received warnings from Woolbright. Those warnings were given to maintenance employees Becky Woods and Patrick Helmon for poor attendance. Burch was at the first step in the Employer's progressive discipline system.

Spencer claimed that she and Young had first discussed Burch's continued employment on April 8. That discussion, she testified, was occasioned by a conversation with Judy Schaum, her administrative assistant, concerning Burch's abilities, discussed infra.

Spencer also claimed that Davenport had reported to her that Burch had persisted in bringing his coffee in to the maintenance area on both April 9 and 10, notwithstanding his April 8 instructions that the employees should not bring food or drink into the plant. Further, Spencer claimed Young had received information from Ray Renken, the production manager, of Burch's refusal to wear safety glasses notwithstanding continued admonitions. Finally, she claimed she looked at his attendance record on April 10 and found that his was significantly worse than most employees.

The decision to terminate Burch, Spencer claimed, was made on the afternoon of April 10, in a second meeting held that day with respect to him, and allegedly was based on his poor attendance, unsatisfactory work performance, insubordination and refusal to comply with safety rules. Before he was discharged, Stoody's management consulted with the parent corporation's headquarters in St. Louis.

2. Coffee drinking

Burch was an inveterate coffee drinker. From the start of his employment, it was his practice to bring a mug of coffee from home when he came to work. He would drink that coffee in the maintenance area during the morning meeting, taking that cup with him as he moved through the plant during the day. He would continue to drink coffee, procured from the breakroom, as he worked in the plant. Burch was not alone in this practice. It is uncontradicted that both employees and supervisors consumed food and drink in the plant prior to April 8. Coffeemakers were maintained in the shipping/receiving and packaging departments. There was a table in the shipping department where employees would eat. Pizzas were regularly brought into the shipping department by the trucking firm servicing Stoody.

Respondent contended that it had a longstanding rule prohibiting food and drink in the plant area because of the presence of many carcinogenic and toxic chemicals used in the manufacturing process. Those chemicals, it was claimed, became airborne when the containers were opened and they were mixed for use. Once in the atmosphere, they posed a risk to those who might ingest them, as by eating or drinking in the plant. The California plant had posted signs prohibiting eating or drinking in the plant area and there may have been a reference to the rule in the brief orientation which Burch and the other maintenance employees attended while they were in California.

There were, however, no such signs posted in the Bowling Green plant and no enforcement of any rule prohibiting food and beverages in the plant area at that plant before April 8. Respondent never posted advisories warning employees to avoid ingesting these chemicals, either in their food, by washing hands before eating, by avoiding hand contact with eyes, nose, or mouth, or by the wearing of masks. Masks were only worn in limited areas of the plant when chemicals were being poured or mixed.

When Stoody issued its employee handbook in March, it contained the following safety rule: ''Do not eat, drink or carry food or beverages outside the designated break areas.'' The rationale for that rule was not given. All employees, including Burch, received a copy of the handbook.

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[6] The General Counsel's complaint, as amended, alleges that this rule, prohibiting employees from counseling others to engage in a work stoppage, violates Sec. 8(a(1).

[7] Burch had been asked to stay and assist Davenport.

Davenport called a meeting of the maintenance employees on the morning of April 8. He told them that management was ''cracking down'' on violations of the food and drink regulations, that while those regulations had not been enforced in the past, enforcement was going to begin. Burch pointed out that a lot of them drank coffee in the plant and asked how strict that enforcement was going to be. Davenport replied that the production employees were jealous and had complained about maintenance employees carrying coffee with them while they were not supposed to have it at their machines. Davenport told them, ''If you have to drink a cup of coffee, keep it low.'' Burch then questioned what the penalty would be for violating this rule. He was told that it was a rule, like speed restrictions on the highway, and if he was caught, there would be consequences, like a ticket.[8]

Burch and a number of the other employees at this meeting were drinking coffee while Davenport was talking. He did not bring coffee into the production areas on that day although he did keep his mug on the top of his toolbox throughout the day, as he had always done.

On April 9, Burch brought his usual cup of coffee in to work, drinking it in the break area before work and carrying it into the maintenance area at the start of his shift. Davenport observed him but said nothing.[9]

On April 10, Burch again entered the maintenance area with his cup of coffee. He testified, without contradiction, that at least two others did the same. This time, Davenport told Burch, ''Donnie, I told you we're not supposed to have coffee in the plant.'' Burch poured out his coffee into a sink. Nothing further was said to him.[10] However, later that morning, Davenport told Spencer about Burch's violations of the food and drink rule. She asked if he had noticed anything else that Burch was doing. A statement was prepared concerning the incidents and Davenport signed it.

Between the promulgation of the employee handbook and Burch's discharge, others had continued to brew and drink coffee in the plant. It was not until about 2 weeks after that discharge that the coffee pot in shipping and receiving was moved into the supervisor's office. Even after the discharge, supervisors were seen carrying cups of coffee through the plant and/or drinking coffee in the plant. The practice of pizzas being brought in to the shipping and receiving department, where employees ate them in the presence of their supervisor, continued for some time after Burch's discharge. The coiling department employees were not instructed to refrain from bringing food or beverages onto the floor until about May 11.

[8] I have relied on the credibly offered testimony of Burch, noting that it is, in the main, consistent with Davenport's testimony. I also note that Davenport did not expressly dispute Burch's assertion that he told the employees to keep their coffee ''low'' if they had to drink it.

[9] At least one employee claimed to have seen Burch drinking coffee in the plant on April 8 and 9. Those alleged instances were neither observed by nor reported to management.

[10] According to Burch, believing that the rule did not apply to the physically separated maintenance area, he explained that he did not think the rule applied to the first cup in the morning. Davenport said that it did. Davenport denied that Burch had offered any explanation or apology. I credit Burch's recollection.

3. Attendance

Respondent's attendance policy defined excessive absenteeism as one unreported absence, two unexcused absences within a ''rolling'' 60-day period or a combination of unexcused absences and tardies. Excessive absenteeism was subject to a four-step progressive disciplinary system, beginning with a verbal written warning accompanied by a counseling session, followed by a written warning, suspension, and then discharge. Where verbal written or written warnings were to be issued, the employee was to be given a copy.

In the fall of 1991, Burch missed a number of days of work because of health problems involving his daughter and his mother-in-law. He had explained these problems to Woolbright and Spencer and had been assured that Stoody would work with him on them. Between August 15 and December 12, 1991, he was absent 10 times, tardy 3 times, and left work early 3 other times. Only three absences, between November 20 and December 11, 1991, were unexcused. He was tardy on January 14 because he had to take his wife to work; that was unexcused. His tardiness was excused on February 27 and he had an unexcused tardiness on March 16 and unexcused absences on March 24 through 27. He had no absences between March 28 and his discharge on April 10.

In March or early April, Burch was out sick and presented a doctor's excuse. As Davenport recalled it, he told Burch that Burch was in violation of the attendance policy and that he had been given a directive by the human resources department to issue a verbal warning to him. However, none was issued. When Burch questioned whether an absence was unexcused if supported by a doctor's excuse, Davenport said that he would check; he never got back to Burch. Burch never received a warning under the Employer's progressive discipline system for his absenteeism.

Spencer calculated Burch's absentee rate, and those of Becky Woods and Patrick Helmon, on April 9 or 10, after meeting with Chet Young. The calculations allegedly showed that over his entire tenure, Burch had been absent or tardy 10 percent of the time. Becky Woods had an attendance record which was substantially worse than Burch. She had been absent at a 30-percent rate. Spencer explained that she had been absent as a result of an on-the-job injury. However, Woods had received a warning for absenteeism while Woolbright was still the maintenance supervisor. This would indicate that not all of her absenteeism resulted from that injury. The other employee, Helmon, was absent about the same amount of time as Burch, 9 percent. Spencer explained Helmon's absences, stating that he had been absent for a couple of weeks for treatment of a substance abuse problem. However, Helmon had received two warnings for poor attendance. As in the case of Woods, this would seem to indicate that not all of his absences were due to those treatments. After these three employees, the next most frequently absent employee had an absentee rate of 3.5 percent.[11]

4. Work performance

As noted, one of the reasons assigned for Burch's discharge was his alleged unsatisfactory work performance. Es-

[11] That absentee rate was calculated for the entire year of 1992. It had not been calculated when Burch was discharged.

sentially, this contention appears to have been based on comments by the other electricians to Spencer and Schaum.

Thus, according to James Pruitt, sometime in February, Woolbright had questioned Pruitt about why it was taking him so long to complete his work. Pruitt told Woolbright that he spent a lot of time helping Burch with the latter's work. Pruitt then went to Spencer to find out if anything had been said about his work performance or the amount of time he was spending to complete his work. He told Spencer that he had spent time helping Burch.

Similarly, according to Schaum, around April 8, Rick Hula told her that he was being blamed for problems on jobs other than those on which he had worked because he was spending time helping Burch. He described a problem involving a transformer on a crane which Burch had allegedly wired improperly.[12] Schaum immediately reported this to Spencer and prepared a memorandum about it. That memorandum did not identify Hula as the source of the report.

Schaum did not report Hula's comments to Burch's supervisor, Davenport. Neither Pruitt's nor Hula's alleged comments were discussed with Burch. Shaum's memorandum was not placed in Burch's personnel file.[13]

Burch received no warnings for poor performance. Contrary to the provisions in Respondent's handbook, he was not ''given every opportunity to correct [his] performance.'' Other employees had received as many as four warnings for poor performance; none of them were discharged for that reason.

Spencer further contended that in reaching the decision to discharge Burch she had considered evaluations purportedly prepared by Woolbright before he left and by Davenport shortly after he became maintenance supervisor. Woolbright's written comments, allegedly prepared at Young's request, are contained on a single unsigned page, with negative comments about five maintenance department employees. It bears a notation, possibly inserted by Young or his secretary, to indicate the date received, ''4–3–92 Woolbright.'' The written comment relates not to Burch's performance but to his attendance: ''Misses work like 2–3 days at a time.'' A second page, a preprinted form headed ''Maintenance Employee Appraisal,'' contains a numerical evaluation of the departmental employees based on attendance, ability-performance, and attitude. On a scale of 10, Woolbright rated Burch a 5 for attendance, and gave him 7s for both ability-performance and attitude. Burch's scores in those categories were below the scores of nine in each category for Pruitt and eight in each for Hula. Woolbright gave a lower score to Becky Woods, two for attendance, seven for ability-performance, and five for attitude.

Woolbright ceased to be the maintenance supervisor about March 15 and left Respondent's employ at about that time. (See R. Br. 8.) Davenport, previously a maintenance mechanic, became the interim maintenance supervisor about March 15 and officially assumed that position on April 1. Davenport's evaluations, Spencer claimed, were prepared on the basis of his observations while he was an employee in the department. He rated almost everyone lower than Woolbright had. To Burch he gave a total of 14, with a rating of 4 for attendance and 5 each for ability-performance and attitude. He scored Woods at a nine (four, three, and two, respectively). Davenport also commented negatively on Burch's attendance, ability-performance, and attitude, noting that Burch had trouble troubleshooting electrical problems and ''seems to think rules apply to everyone but him.''

These evaluations were not shown to the employees or placed in their personnel files. Spencer volunteered that they were ''not done for the purpose of any type of disciplinary actions towards employees.'' The only evaluation of Burch which was contained in his personnel file was his probationary performance review, completed on September 17, 1991, by Woolbright and countersigned by both Young and Spencer. It rates Burch as satisfactory in quality and quantity of work, attitude and attendance/punctuality; it rates him excellent in cooperation. Woolbright's written comment states: ''Donnie is good worker & takes direction well . . . Donnie is an all round craftsman.'' Woolbright's evaluations of the other employees were, in the main, better than those of Burch; most received more ''excellents'' than did Burch. Both Pruitt and Hula had better evaluations than did Burch.

Davenport was not consulted with respect to the decision to discharge Burch.

5. Safety glasses violations

Under the rules in effect at Stoody from July 1991, the failure to wear safety glasses when entering or working in undefined ''eye hazard areas of the plant'' was ''considered a serious infraction of company rules and will be accompanied by some form of reprimand or step of progressive discipline.'' The rule was expanded in the March 1992 handbook to cover the entire plant area.

In an effort to portray Burch as one who treated employer rules with disdain, Respondent presented testimony concerning his alleged infractions of the safety glasses rule. Burch testified that he adhered to that rule to the best of his ability, removing them only to wipe sweat away or when washing up.

Davenport, however, claimed that he observed Burch to be in violation of the rule 75 to 80 percent of the time, usually keeping the glasses perched on the top of his head. He never mentioned these alleged violations to Burch. Similarly, Production Manager Renken claimed to have seen Burch on an almost daily basis in the plant. Most of the time, he said, Burch had his glasses perched on top of his head. Renken claimed that he mentioned the rule to Burch around the first of the year and again about 3 weeks later. There was no testimony as to what were considered the ''eye hazard areas'' and neither Davenport nor Renken described where these alleged violations took place. I am inclined to believe that Burch failed to wear his safety glasses somewhat more fre-

[12] This testimony is particularly suspect; Hula was the second shift electrician. He sometimes completed projects started by Burch or Pruitt, but did not work with them. Hula did not testify and the record contains no explanation of when Hula would have had the opportunity to help Burch. Burch credibly denied responsibility for any wiring errors on this transformer and pointed out that everyone had worked on it.

[13] Schaum also testified to having overheard a conversation between Woolbright and Burch, in early February in which it appeared that Woolbright may have been questioning Burch's ability to correctly rewire certain equipment, and to a conversation with Burch, in early March, in which he told her that he was not responsible for a problem for which he had been criticized by Woolbright. Neither of these incidents warranted either discussion with the supervisor or inclusion of a memorandum in Burch's file and neither is significant enough to warrant further discussion or consideration here.

quently than he admitted, but not nearly as often as either Davenport or Renken claimed.

Renken acknowledged that others also violated the safety glasses rule, but, he claimed, not with Burch's frequency. Employees similarly testified that violations of this rule, by both employees and supervisors, were not uncommon.

Nothing was said to Burch about his alleged violations of this rule when he was discharged. Burch was never given a warning concerning his alleged infractions of this rule.

F. *Analysis*

1. Evidentiary rulings

Director of Manufacturing Chet Young did not testify in this proceeding and no explanation was offered at the hearing for his absence. Noting that, the General Counsel has requested that I draw adverse inferences both as to Young's knowledge of Burch's union activities and Respondent's motivation for his discharge. After briefs were filed, Respondent moved to supplement the record with evidence that Young had terminated his employment with Stoody in July 1992, acknowledging an inadvertent failure to place this information in the record. The General Counsel opposed the motion as untimely and Respondent's evidence as not newly discovered. The General Counsel did not contend that Young was still in Respondent's employ. Nor did counsel for the General Counsel dispute the assertion, contained in Respondent's motion, that her witnesses must have been aware of Young's earlier termination.

I must agree with the argument of Respondent's counsel that it would be inappropriate and unjust to draw damning adverse inferences on the basis of an inadvertent error, particularly where one of the requested inferences goes to the ultimate issue in the case.[14] Inasmuch as the General Counsel did not dispute the claim that Young was no longer available to Respondent as a witness, I find it unnecessary to rule upon the motion to supplement the record with evidence of his termination and I accept the representation of counsel, as an ''officer of the court'' that he was not.

Respondent also sought to supplement the record with testimony of Spencer, given before the Kentucky Division of Unemployment Insurance prior to the unfair labor practice hearing, concerning what was meant by the references to ''attitude'' in Burch's dismissal.[15] Spencer testified on behalf of Respondent in the proceeding before me. She could have been asked these questions at that time but was not. It would be entirely inappropriate to receive such evidence now, because to do so would deprive the General Counsel of any opportunity for cross-examination. I find that Respondent's reference to Burch's ''bad attitude,'' particularly Young's statement that he was ''not Stoody material,'' was precisely what the Board has concluded on many occasions it was, ''simply a euphemism for union sympathy.'' *International Automated Machines*, supra at fn. 21, and cases cited there.

2. The 8(a)(1) violations

The General Counsel's amended complaint alleges two independent 8(a)(1) violations, the rule prohibiting employees from counseling others to engage in a work stoppage and Spencer's suggestion that employees who are dissatisfied with their working conditions should quit.

The right to engage in a strike, i.e., a concerted work stoppage, is basic to the Act. *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). That right becomes merely illusory if one employee may be precluded from seeking the support of others to join with him or her in a strike or from counseling with one others about the possibility or tactics of a work stoppage. Sustaining Respondent's rule, moreover, would permit the employer to discipline every employee who engages in a strike, particularly its leaders, on the basis that they had counseled with one another concerning that strike or are counseling those who cross their line to support their effort. A prohibition such as this clearly and unquestionably interferes with, restrains, and coerces employees in the exercise of their Section 7 rights.

Moreover, Respondent's rule is akin to a prohibition of discussions of union activities. As the court stated in *Turnbull Cone Baking Co. v. NLRB*, 778 F.2d 292, 296 (6th Cir. 1985), enfg. 271 NLRB 1320 (1984):

> [A]n employer violates the Act by implementing a rule to inhibit employees' union activities, *Price's Pic-Pac Supermarkets*, 707 F.2d [236] at 237 [6th Cir. 1983], or by imposing a rule to restrict discussion of union matters. *Union Carbide Corp. v. NLRB*, 714 F.2d 657, 663–664 (6th Cir. 1983).

See also *Fontaine Body & Hoist Co*., 302 NLRB 863, 870 (1991).

Similarly violative is Spencer's suggestion to Burch, after soliciting his views as to what was wrong with the employees, that those who were ''so nitpicking'' as to complain about detrimental actions taken unilaterally by the Employer should seek other employment. Such statements convey the message that complaints about working conditions and continued employment are incompatible and implicitly threaten discharge to those who would voice them. *Fontaine Body & Hoist*, supra at 866; *House Calls, Inc*., 304 NLRB 311 (1991); *Rolligon Corp*., 254 NLRB 22 (1981). This statement, having been directed at a known union sympathizer,

[14] The adverse inference as to knowledge is unnecessary. Knowledge of Burch's union sympathies is imputable to both Young and Spencer from the knowledge acquired by Woolbright and Hugelmaier. *Pinkerton's, Inc*., 295 NLRB 538 (1989). See also *International Automated Machines*, 285 NLRB 1122 fn. 6 (1987). Moreover, once Local 369's campaign became known to management, I find, as did the administrative law judge in the latter case, that I must ''give the Respondent's top management credit for being able to put two and two together'' and conclude that the employee who wore a Local 369 T-shirt and carried a cup bearing its logo was, more probably than not, involved in that campaign. Id. at 1131.

[15] That state agency held that Burch was disqualified from receiving benefits. While the decisions of such tribunals are entitled to some probative weight, they are not controlling in a Board proceeding and I decline to accord this decision any significance here. *American Furniture Co*., 293 NLRB 408, 428 (1989). Appearing before the referee, Burch had asserted that he had been discharged for his union activity and that Respondent's reliance on the alleged work rules violations had been pretextual. In upholding the referee's decision, the commission ignored Burch's contention and the evidence and concluded, ''Whether it was a pretext or not claimant violated a reasonable work rule in such a disdainful manner as to constitute misconduct.'' Such a conclusion flies in the face of logic, at least by Board standards. The Employer's asserted reason cannot be both a pretext and grounds for the discharge.

the alleged discriminatee, cannot be said to have been de minimus.

3. The 8(a)(3) violation

Wright Line, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), provides the analytical mode for resolving discrimination cases turning on the employer's motivation. Under that test, in *Fluor Daniel, Inc*., 304 NLRB 970 (1991), the Board stated:

> The General Counsel must [first] make a *prima facie* showing sufficient to support the inference that protected conduct was a ''motivating factor'' in the employer's decision. Once accomplished, the burden shifts to the employer to demonstrate that the same action would have taken place notwithstanding the protected conduct. It is also well settled, however, that when a respondent's stated motives for its actions are found to be false, the circumstances may warrant an inference that the true motive is an unlawful one that the respondent desires to conceal.

A prima facie case is made out where the General Counsel establishes union activity, employer knowledge, animus, and adverse action taken against those involved or suspected of involvement which has the effect of encouraging or discouraging union activity. *Farmer Bros. Co*., 303 NLRB 638, 649 (1991). Inferences of animus and discriminatory motivation may be warranted under all the circumstances of a case; evidence of suspicious timing, false reasons given in defense, or disparate treatment all support such inferences. *Electronic Data Systems Corp*., 305 NLRB 219 (1991); *Columbian Rope Co*., 299 NLRB 1198 (1991).

I am satisfied that the General Counsel has established the requisite prima facie case. Burch was a member of Local 369, in sympathy with its goals and actively involved in its organizational campaign. His sympathies were known to at least two supervisors whose knowledge is imputable to higher management. *Pinkerton's, Inc*., 295 NLRB 538 (1989). Moreover, I have found that Respondent's managers were definitely curious about the identity of those who were supporting that campaign and knew of Burch's openly displayed union leanings. They knew or had reason to suspect that he was involved in the campaign. Even their suspicion that Burch was involved in the campaign would establish the requisite element of knowledge. *New River Industries*, 299 NLRB 773 fn. 2 (1990).

Burch was terminated early in the Union's campaign. The discharge of one so openly associated with the Union would clearly discourage continued union activity.

Additionally, I find such union animus as would support an inference of discriminatory motivation. Thus, even without relying on the policy statement and Aqua's letter, animus is established by the warnings from two supervisors to Richards to ''lay low'' inasmuch as he was suspected of engaging in union activities (implicit threats notwithstanding the omission of such allegations from the complaint), Schaum's interrogation of Richards[16] and Woolbright's interrogation of Burch (similarly not alleged as independent violations), Spencer's threatening response to Burch after she questioned him concerning discontent among the employees and the prohibition against the counseling of work stoppages which was contained in the employee handbook.

The evidence further warrants the conclusions that Respondent's animus was directed against Burch, and that it was endeavoring to build a case against him. (These facts also support the conclusion of knowledge.) When Davenport reported Burch's infraction of the coffee rule on April 10 to Spencer, she asked whether Davenport had noticed anything else which Burch might have done. When Burch was terminated, Young told him that he had a bad ''attitude'' and was not ''Stoody material.'' Both are euphemisms for ''union sympathizer'' and were so intended here.

In the circumstances here, moreover, I find that Respondent's policy statement on unions may fairly be considered as antiunion animus supporting a finding of discriminatory motivation. As the Board stated in *Gencorp*, 294 NLRB 717 fn. 1 (1989):

> [The] Board has consistently held that conduct that may not be found violative of the Act may still be used to show antiunion animus. See, e.g., *General Battery Corp*., 241 NLRB 1166, 1169 (1979).

Respondent's policy statement set forth its antipathy toward unions about as strongly as any statement could without independently violating Section 8(a)(1). It pledged to prevent any union from coming into the plant ''by every proper and legal means available.'' The handbook went on, contrary to that pledge, to promulgate an unlawful rule discouraging union activity, one which prohibited employees from counseling other employees to engage in a work stoppage. Much as Spencer's implied threat against those who would complain about working conditions negated Respondent's claim of openness to dealing with employees as individuals, the juxtaposition of this threat following the pledge negates the assurance that Respondent's opposition to the Union would be expressed only by proper and legal means. Employees could reasonably conclude that Respondent would use unlawful as well as lawful means to prevent them from securing union representation.

The General Counsel having put forth a strong prima facie case of discrimination, the burden shifts to the Respondent to demonstrate that it would have discharged Burch even in the absence of his protected activity. Respondent's defenses, which I find to be pretextual, fail to meet that burden. *Farm Fresh, Inc*., 301 NLRB 907 (1991). Moreover, the pretextual nature of those defenses supports the inferences underlying the General Counsel's case. *Fluor Daniel*, supra.

Initially, Respondent relied on Burch's attendance. His attendance record, while far from perfect, cannot support the discharge. Respondent has a progressive disciplinary system for attendance and other problems. Burch had received no warnings under that system and was only at its first step. Two other employees had attendance records which were as bad or worse; one had received two warnings, the other had received one, but neither was discharged. Respondent explained away the attendance records of these employees, noting that one had sustained a work related injury and the other had undergone treatment for substance abuse. Respondent

[16] Schaum may not have been a supervisor. However, as the administrative assistant in the human resources department, she was clearly Respondent's agent for labor relations matters.

failed to accord the same consideration to Burch whose 1991 absences due to illnesses in his family had been expressly excused with the assurances of Spencer and Woolbright that Respondent would work with him through those difficult times. The failure to follow its express progressive disciplinary policies and the disparate application of its attendance policies against Burch evidence pretext. *Dynatron Bondo Corp*., 302 NLRB 507, 512 (1991); *Farm Fresh*, supra; and *American Fleet Maintenance Co*., 289 NLRB 764, 770–771 (1988). I note, too, that Burch's last unexcused absence was on March 27; there were no absences in April such as might have precipitated a decision to discharge him without recourse to the progressive disciplinary system.

As in the case of his absences, Burch had received no warnings and had not been counseled for his alleged poor work performance. Indeed, the allegations against him came not from his supervisors, who were not consulted with respect to the discharge decision, but from two unsubstantiated complaints of his coworkers, neither of which was significant enough to warrant inclusion in his personnel file or counseling with him. See *Visador Co*., 303 NLRB 1039, 1044 (1991).

The only true evaluation of Burch, done on completion of his probationary period, ranked him as satisfactory or better, albeit lower than the other two electricians. The evaluations allegedly completed by Woolbright after he ceased to be the supervisor and by Davenport upon assuming that function do not support Respondent's defense. Assuming that they were actually prepared when and why Respondent claimed they were, and not in anticipation of an unfair labor practice charge,[17] Spencer admitted that they were not included in the personnel files or intended to support disciplinary action.

Even accepting those evaluations as legitimate, they do little to support Respondent's defense. The evaluation attributed to Woolbright marks Burch down primarily because of his attendance, not his ability and performance or his attitude. As to those, Woolbright gave Burch acceptable ratings, 7 out of a possible 10 points. Davenport's evaluation of Burch was considerably lower than Woolbright's. However, Davenport admitted that it was not based on his observations as Burch's supervisor. Rather, it was based on his alleged observations as a coworker, covering the same period purportedly evaluated by Woolbright. Davenport was not a maintenance electrician; the record does not indicate either his experience with electrical work or the amount of time he spent working with or near Burch.

The foregoing evidence requires a conclusion that Respondent's claim of poor work performance was pretextual. In reaching that conclusion, I note, particularly, Respondent's basis for claiming poor work performance by Burch, its failure to question Burch about the allegations of Pruitt and Hula,[18] its failure to document those alleged failings in his personnel file or to warn or counsel him with respect to them contrary to its established disciplinary proceeding, and Respondent's failure to consult with Burch's supervisor with respect to his discharge. I also note the satisfactory evaluation of him in September and the ambiguous nature of the ''Maintenance Employee Appraisals.''[19]

Respondent's reliance upon Burch's violations of the coffee policy is somewhat more substantial but still pretextual in my view. His coffee drinking on April 10 was briefly alluded to in the discharge interview but was not asserted as a reason on his discharge papers. More significantly, when he announced the rule to the maintenance department, Davenport lead Burch to believe that it would be enforced as most safety rules at Stoody were enforced, with a wink and a nod. Burch was told that, like a traffic infraction, he would receive some measure of discipline if caught and it was suggested that if he had to drink coffee in the plant, he should ''keep it low key.'' When Davenport saw Burch with coffee on April 9, he said nothing, reinforcing this impression. Even when Davenport spoke to Burch about his coffee on April 10, he issued no warning but merely reminded Burch of the rule. I note, too, that here, as in the case of his alleged poor performance, there was no attempt to use the established progressive disciplinary system and no one bothered to ask Burch for his side of the story, to determine whether he understood the rule or even whether he had violated it.

Moreover, the rules barring food and drink from the plant areas were disparately enforced both before and after Burch's discharge. Others had coffee on the morning of April 10; no action was taken against them. Employees and supervisors continued to eat, drink, and carry beverages through the plant, all contrary to the published rule, after the handbook was issued and even after Burch was discharged. In the coiling department no specific announcement of the rule was made until a month after Burch was discharged.

Respondent's contentions with respect to Burch's alleged violations of the rule requiring the wearing of safety glasses appear to be an afterthought. Even assuming that he was in violation of the rule to the extent contended by Respondent, his behavior was long condoned. Aside from a passing reminder, he was not admonished, warned, or otherwise disciplined for not fully complying with the rule. The safety glasses rule, as wise as it may have been, was not a big issue with Respondent's management.

Assuming that the evidence concerning Burch's supposed failure to wear his safety glasses was introduced merely to show that he treated rules with disdain, it falls short of the mark. Such an attitude is hardly shown where those rules are enforced with disdain.

Respondent argues, in essence, that an employee's union activity should not be permitted to shield that employee from discipline for unacceptable performance or behavior. The obverse of that truism is more applicable here. Behavior or per-

[17] I seriously question when and for what purpose they were prepared. I note, first, that Woolbright's was apparently turned in more than 2 weeks after he ceased to be the supervisor and had left Respondent's employ. Noted also is the fact that while Davenport had been an employee in the maintenance department under Woolbright, his name does not appear on the printed form as one of the employees to be rated. This would tend to establish that the form was not even in existence until after he was named supervisor, about April 1.

[18] ''An employer's failure to adequately investigate an employee's alleged misconduct has been found to be an indication of discriminatory intent.'' *Clinton Food 4 Less*, 288 NLRB 597, 598 (1988).

[19] Were I to accord the decision of the Kentucky Unemployment Insurance Commission any weight, I would also note its conclusion that Burch was not disciplined or warned for anything other than his violation of the coffee rule and would not have been discharged for any of those other alleged violations.

formance previously tolerated or condoned cannot justify the discharge of an employee once his union activity becomes a threat to the employer. The facts here compel me to conclude that that is precisely what has occurred here. Burch's discharge, I must find, was motivated by his union activity and not by any failings in his work performance or behavior. I conclude that that discharge violated Section 8(a)(3) and (1) of the Act.

CONCLUSIONS OF LAW

1. By prohibiting employees from counseling others with regard to work stoppages and by suggesting that expressions of dissatisfaction with working conditions is inconsistent with continued employment, Respondent has threatened employees with discharge if they engage in union or other protected concerted activity and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Donald Burch because of his union and other protected concerted activities, Respondent violated Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having discriminatorily discharged Donald Burch, an employee, the Respondent must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

ORDER

The Respondent, Stoody Company, Division of Thermadyne, Inc., Bowling Green, Kentucky, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline and discharge by prohibiting them from counseling one another about work stoppages and by suggesting that expressions of dissatisfaction with working conditions is inconsistent with continued employment.

(b) Discharging or otherwise discriminating against employees because they support International Brotherhood of Electrical Workers, Local 369 or any other union or engage in union or other protected concerted activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Donald Burch immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(b) Remove from its files any reference to the unlawful discharge and notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its plant in Bowling Green, Kentucky, copies of the attached notice marked ''Appendix.''[21] Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''